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OCTOBER TERM, 1966

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IN THE MATTER OF JOHN RUFFALO, JR.,
Petitioner.

BRIEF OF OHIO STATE BAR ASSOCIATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

SAMUEL T. GAINES,
700 Union Commerce Bldg.,
Cleveland, Ohio,

WALTER A. PORTER,
Talbott Tower,
Dayton, Ohio,

P. PAUL PUSATERI,
137 W. Main Street,
Wilmington, Ohio,

JOHN R. WELCH,
33 West Eleventh Avenue,
Columbus, Ohio,
Counsel for Ohio State Bar Association.

CRAIG SPANGENBERG,
1500 National City Bank Bldg.,
Cleveland, Ohio,
Counsel for Petitioner.

MIDWEST LAW PRINTERS AND PUBLISHERS, INC., Columbus, Ohio 43216

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STATEMENT AND ARGUMENT

In 1962, the Mahoning County Bar Association filed with the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio, charges of professional misconduct against petitioner, Ruffalo. The Board of Commissioners is made up of seventeen members of the Ohio Bar. They are appointed by the Supreme Court of Ohio, pursuant to its Rule XVIII (1), and act as an arm of that Court.

The complaint against petitioner alleged fourteen charges of misconduct. The Board of Commissioners convened a panel of three of its members to hear the evidence on the charges and make an initial report to the Board. The charges covered generally acts of solicitation of F.E.L.A. cases, maintenance of persons asserting claims, attempted bribery, and hiring a railroad employee, Michael Orlando, to act as an undercover agent to assist petitioner in solicit-

ing and investigating cases against various railroads, including Orlando's employer, the Baltimore and Ohio Railroad.

The panel conducted hearings which extended from December 26, 1962 to August 16, 1963. The panel report sustained seven and dismissed seven of the charges. It was unanimously adopted by the seventeen-member Board of Commissioners. The charges sustained involved solicitation, maintenance of clients, attempted bribery to dissuade a witness from testifying against petitioner, and the use of Orlando as an undercover agent.

The Findings of Fact, Conclusions and Recommendation of the Board were returned to the Supreme Court of Ohio. The recommendation of the Board was that petitioner be disbarred. The Supreme Court of Ohio sustained charge number eight, maintenance of clients, and thirteen, use of the undercover agent Orlando to investigate claims against his regular employer, the Baltimore and Ohio Railroad. It gave judgment that petitioner be suspended for an indefinite period of time from the practice of law. *Mahoning County Bar Association v. Ruffalo,* 176 Ohio St. 263 (1964). Certiorari was denied by this Court, *Ruffalo v. Mahoning County Bar Association,* 379 U.S. 931 (1964).

In deciding that petitioner should be suspended from practice, the Supreme Court of Ohio, in addition to its consideration of the current charges, recited and took into account the fact that in 1957 petitioner had been found "guilty of unprofessional conduct in his office as an attorney at law * * * in that he did by and through duly authorized agents and employees solicit professional employment from sundry people."

Following the judgment of the Supreme Court of Ohio, the United States District Court for the Northern District of Ohio, Eastern Division, pursuant to its own rules, com-

menced an inquiry as to the fitness of petitioner to continue as a practitioner in that Court. The District Judge had before him the record and proceedings which culminated in the decision of the Supreme Court of Ohio. He disagreed, however, with that decision and refused to suspend petitioner from practice in the District Court. *In re Ruffalo,* 249 F. Supp. 432. He withheld the entry of a final order, stating that "In the event that the Sixth Circuit Court of Appeals reaches a different conclusion this court will reconsider its findings."

After the above decision by the District Court, the Court of Appeals for the Sixth Circuit issued an order to petitioner to show cause why he should not be stricken from the roll of counsel in that Court. The Court of Appeals had before it the entire record of the proceedings in the Supreme Court of Ohio, the response and brief of petitioner, the brief of the Ohio State Bar Association as amicus curae, and oral arguments of counsel. Following the admonitions of this Court in *Theard v. United States,* 354 U.S. 278, 1 L. Ed 2d 1342 and *Selling v. Radford,* 243 U.S. 46, 61 L. Ed 585, the Court proceeded to review on its own the validity of the conclusions of the Supreme Court of Ohio. Agreeing with the conclusions of the court, the Court of Appeals struck petitioner's name from the roll of counsel admitted to practice in that Court, saying, "We need not, and do not, announce a rule for this Circuit that, standing alone, the conduct involved in Charge No. 8 (the furnishing of living expenses to his clients) would prompt us to discipline Ruffalo. We do not reach that question. *We are satisfied that with Ruffalo's previous conviction in 1957 of solicitation,* and the conduct making up Charge 13, there is sufficient to permit us consistent with 'principles of right and justice,' to 'allow the natural consequences of the judgment (of the Supreme Court of Ohio) to have

their effect * * *,' *Selling v. Radford,* 243 U.S. 46, 51, and strike Mr. Ruffalo's name from the roll of counsel admitted to practice in this Court." *In re Ruffalo,* 370 F. 2d 447, 450. (Emphasis added)

1. The Trial Bar Needs Guidelines For Permissible Conduct In Case Preparation.

Petitioner argues that this case is of vital concern to every practitioner at the federal bar. He says the decision imposes arbitrary limits on methods of trial preparation.

Of course this case is important to Mr. Ruffalo. Simply put, he would like to continue his practice at the federal bar while he is suspended from practice in the State courts.

So far as we know, this is the only case of a claimant's lawyer employing a railroad employee as an undercover agent to investigate cases against his own employer. Mr. Ruffalo admitted as much at his hearing in the state proceedings. Mr. Ruffalo had just testified that all top lawyers who "practiced railroad law" always have a "good railroad" man in their employ, some one to reach out to and to talk to. He was then asked by Judge Middleton, a member of the hearing panel if,

> "They all have an undercover man in the employ of the road?" Mr. Ruffalo answered: "No, they have somebody that knows railroading and railroads." (R. 661)

We are in accord with the view of the court below that: "We do not believe we should tell today's society that notwithstanding the respect we ask it to give us as a profession of skillful and high minded men we do not have the ability to adequately represent our clients except through planting secret agents in the shops of those we call to account in the courts. If this kind of espionage has become a way of life in some of today's business competi-

tion, such reality should not prompt us to say that no more is expected to today's lawyers than that they conform to the minimal standards of the market place." *In re Ruffalo,* 370 F. 2d 447, 453.

2. The Independent Jurisdiction of the Federal Courts.

3. Disciplinary Action on the Present Grounds Would Inhibit Enforcement of Rights Under an Important Federal Statute.

4. The Grounds Relied on For Disbarment of Petitioner Are So Arbitrary and Irrational That to Act on These Grounds Would Deny Petitioner Due Process of Law.

The court below obedient to the rules laid down by this court in *Theard v. United States,* 354 U.S. 278, L. Ed. 2d 1342, and *Selling v. Radford,* 243 U.S. 46, 61 L. Ed. 585 allowed petitioner to bring the entire record of the state proceedings before it for review, to file a brief in support of his view of that record and the judgment of the state court, and to orally argue his position.

Based upon its own independent review of that record and the judgment of the Supreme Court of Ohio, the majority of the court below has determined that petitioner should be struck from the roll of counsel admitted to practice in that Court. The court saying at page 450: "We need not, *and do not,* announce a rule for this Circuit that, standing alone, the conduct involved in Charge No. 8 (the furnishing of living expenses to his clients) would prompt us to discipline Ruffalo. *We do not reach that question.* We are satisfied that with Ruffalo's previous conviction in 1957 of solicitation, and the conduct making up Charge 13, there is sufficient to permit us, consistent with 'principles of right and justice' to 'allow the natural consequences of the judgment (of the Supreme Court of Ohio)

to have their effect * * *.' *Selling v. Radford,* 243 U.S. 46, 51, and strike Mr. Ruffalo's name from the roll of counsel admitted to practice in this Court." (Emphasis added.)

Two things should be noted from the above quoted holding of the court below. One. At page 16 of his petition, petitioner again states that, "The Circuit Court of Appeals has found that this charge (Charge No. 8, advancement of living expenses to clients) did not justify disbarment and petitioner will not elaborate upon it here." This statement is obviously not in accord with the holding by the court below. We note also that petitioner says he will not elaborate upon it here. Yet, recognizing that the court below did not make a finding on Charge No. 8, petitioner devotes the better part of pages 18, 20 and 21 of his petition arguing that discipline based upon such a finding is arbitrary and irrational. What he apparently seeks by this argument is a review by this court of the proceedings in the state court which this court denied in 1964. *Ruffalo v. Mahoning County Bar Association,* 379 U.S. 931. This argument is neither relevant nor pertinent to the findings and judgment of the court below.

Two. Petitioner chooses to ignore the fact that the judgment below (and the judgment in the Supreme Court of Ohio) was based in part on the fact that he had been disciplined in the year 1957 for solicitation of professional employment from sundry people through duly authorized agents and employees.

5. Petitioner's Disbarment Has Denied Him Due Process of Law.

Petitioner was not disbarred in the court below because of his failure to "produce records to prove he had not hired and paid Orlando as a solicitor of cases." Nor was he disbarred, for asserting privilege against self-incrimina-

tion. He made no such assertion. In other words, petitioner does not come within the recent ruling of this Court in *Spevack v. Klein,* 35 U.S. Law Week 4140.

Petitioner was struck from the rolls of the court below because that Court could not "find totally invalid the view that an experienced lawyer who hires a railroad employee to act as an undercover agent to obtain evidence and information for use in suits against his own employer, does not exhibit the fair character and integrity which must be the mark of a lawyer."

Petitioner does not dispute the facts that form the basis of the above conclusion. His quarrel is with the conclusion. He just does not agree that he did anything wrong. However, after a review of the record of the entire proceedings in the state court, the court below was convinced that petitioner not only acted improperly but also that he was aware that his actions were improper.

> "Ruffalo asserts that his use of cash to pay his agent, his failure to carry these transactions in his books, and his destruction of what records he did have were necessary to protect Orlando from reprisals by his regular employer. The Ohio Bar, its Supreme Court and this court had, and have, the right to draw inferences as to what this conduct portrays. The absence of records would not hide what was going on if, when inquiry was made, both Orlando and Ruffalo told the truth. What then was there to fear from honest record keeping."

Judge Edwards, in his dissenting opinion, was also convinced that petitioner knew his actions were improper.

> "Respondent's action in hiring Orlando for the purposes admitted by respondent, in concealing the employment relationship and in being a great deal less than fully cooperative with the Bar Association's investigation of his record in this matter convinces the majority that he was aware of the conflict of interest

> inevitable (for Orlando!) in his hiring Orlando to investigate accident cases against Orlando's own employer. These facts also convince me."

Charge No. 13, the employment of Orlando to investigate cases against his employer, was added as a specification of misconduct on motion of counsel for the Mahoning County Bar Association during the course of the Board of Commissioner's hearing December 28, 1962. Mr. Ruffalo objected to this being done, and the Board advised him that he could offer proofs in opposition to the charge. The charge was based upon testimony of Ruffalo and Orlando already in the record. On August 16, 1963, the hearing was again convened to hear additional evidence. But no further evidence was offered by petitioner on this point.

The court below found no procedural impropriety in the above action nor was any raised by counsel for petitioner in that court.

However, petitioner asserts here, as he did below, deprivation of due process in that prior to his described use of Orlando, he was not warned that such would be looked upon as misconduct.

In rejecting this claim, the court below said:

> "They complain for him that no Canons of Ethics had ever been promulgated forbidding this practice. We will not hold that due process requires that our bar associations anticipate every conceivable type of misconduct in which any of its members may indulge and then fashion and announce a Canon of Ethics to fit each act of misconduct. Surely our profession is not so morally and ethically naive as to need always advance definition of what is, and what is not, impermissible behavior."

We are in accord and ascribe to the above holding.

Statutes in many, if not most of the states, authorize the

suspension or removal of attorneys upon specified grounds. However it is generally held that such statutes do not restrict the general powers of the court over attorneys, who are officers, and that they may be removed for other than statutory grounds. And in Ohio "The statutory grounds for the suspension or disbarment of an attorney are not exclusive and are not strictly binding upon the courts, other serious unprofessional and unethical conduct may be the basis for court proceedings to reprimand, suspend or disbar." *In re McBride,* 164 Ohio St. 419, 424, and cases cited therein.

CONCLUSION

The Ohio State Bar Association respectfully submits that the Petition for Certiorari should be denied.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing brief has been mailed by first class mail with postage prepaid to attorney for Petitioner, Craig Spangenberg, at his office located at 1500 National City Bank Building, Cleveland, Ohio.

/s/ Samuel T. Gaines,
Counsel for Ohio State Bar Association.